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No. 239.

Reply Brief of Atty Gen. U. S.

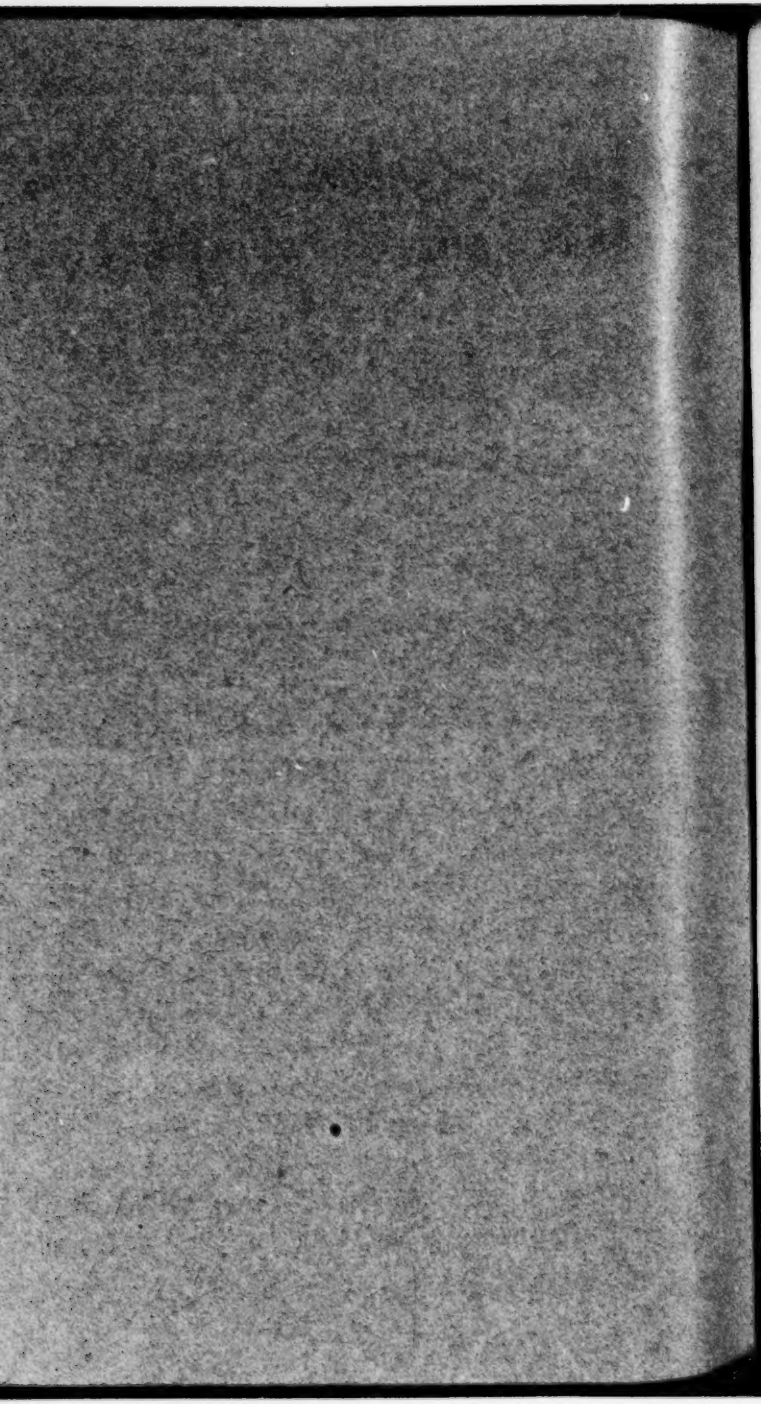
Filed Nov. 14, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
THE RIO GRANDE DAM AND IRRIGATION COMPANY et al. } No. 239.

BRIEF FOR THE UNITED STATES IN REPLY.



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In view of the position assumed by the learned counsel for defendants in his brief, it seems proper to make a short reply upon the part of the United States.

THE FINDINGS.

At the opening of his printed argument (p. 28) counsel makes the claim that the findings of the trial court are beyond any manner of question here, except as to their sufficiency in themselves, to sustain the ultimate conclusion upon which the bill was ordered to be dismissed.

If full faith be reposed in the correctness of this position, counsel is singularly inconsistent, in that nearly every page of the argument which follows is laden with allusions to, quotations from, and arguments based upon the evidence in the case. It is somewhat peculiar to seek to deny to us any right of appeal to

the evidence in regard to the findings, and to seek absolute sanctuary in them for the appellees, and then from his supposed refuge treat court and counsel to copious extracts from the evidence in all its bearings.

Manifestly this evidence may be properly appealed to and used in the case of certain well-defined purposes in connection with the findings, or it must be absolutely abandoned, put aside, and held to be of no present consequence. Plainly, reference to it, and use of it, can not be denied, and then arguments built upon it as fully as if counsel was summing up a case before a jury.

We take the position that this court has nowhere said that it would not, in cases brought by appeal from Territorial courts, examine into the evidence to ascertain the truth of the findings if, in proper time and form, it be alleged, either—

(*a*) That there is no evidence in the case to support the findings of the trial court; or,

(*b*) That the uncontradicted evidence upon any material point was to the opposite effect of the finding; or,

(*c*) That the trial court neglected or refused, when requested, to find one way or the other upon a material point supported by uncontroverted evidence.

On the contrary, we submit that this court has repeatedly held as general doctrine that such allegations as to findings raised questions of law which this court properly could and would consider, and that such general doctrine is as applicable to cases coming

up from the courts of the Territories as it is to cases from the Federal courts or from the courts of the States.

Without taking time here to review the decisions referred to in defendant's brief, we will cite and briefly quote from another line of decisions of this court and of some of the State courts, which mark clearly the distinction between the examination of contradictory evidence for the purpose of weighing it and the examination of evidence to ascertain whether the trial court has found or could have found the facts as stated in the record, and whether, having found the facts, they are directly against the uncontradicted evidence; or, whether, there being undisputed evidence of a material character, the court has refused to state it as a finding, or, having found the same, has treated it in such a way as to amount to a perversion of it.

THE DECISIONS.

In *Barwell* v. *Wirth* (61 Pa. St., 135) Justice Sharswood said:

> Whether there is any evidence at all is a pure question of law for the court.

With respect to the findings of a referee, Chief Justice Hunt, in *Fellows* v. *Northrup* (39 N. Y., 119), said:

> If there is, however, no competent evidence to sustain such conclusions, or if the undisputed evidence establishes the contrary, it then becomes a question of law, and we are at liberty to examine it.

And in *Putnam* v. *Hubbell* (42 N. Y., 106) the same court, speaking with respect to the exceptions to the

findings of a referee which were not based upon any evidence, says (p. 113):

> It is often insisted, and some countenance to the position has been given, in some opinions delivered here, that this court is in all cases concluded by the finding of the referee upon matters of fact. * * * This position is true as to such findings, in support of which any evidence was given authorizing them, irrespective of the evidence given in conflict therewith. * * * But the finding of a fact, without any such evidence, presents a different question; a referee has no right to find a fact in favor of a party, in the absence of any proof tending to establish it, any more than a judge upon trial has under like circumstances to submit such question to a jury. * * * So where a referee finds a material fact, in the absence of proof tending to establish it, he commits a legal error which, upon the proper exception taken, may be reviewed in this court.

In *Sheldon* v. *Sheldon* (51 N. Y., 354) the court say (p. 355):

> If the referee has found any material fact wholly without evidence or against the undisputed evidence, then he has committed an error of law which is reviewable upon this appeal.

See also *Tillman* v. *Bresler* (58 N. Y., 123) and *Andrews* v. *Raymond* (58 N. Y., 676).

And this court, in *Laing* v. *Rigney* (160 U. S., 540), speaking by Mr. Justice Shiras, says:

> It is well settled that exceptions to alleged findings of facts because unsupported by evi-

> dence present questions of law reviewable in courts of error.

A plain intimation by way of exception is also made by this court in the case of *Hathaway* v. *Bank of Cambridge* (134 U. S., 494, 498), cited by counsel for the defendants.

In *The City of New York* (147 U. S., 72) Mr. Justice Brown, speaking for the court, with respect to the rules which govern this court under the act of February 16, 1875 (18 Stat., 315), in reviewing cases upon appeal, says (p. 77):

> If the court below neglects or refuses to make a finding, one way or the other, as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what was found, when in truth there was none. Both of these are questions of law and proper subjects for review in an appellate court.

And a number of decisions are quoted from, and the act of February 16, 1875 (18 Stat., 315), is referred to in the opinion. That statute is almost identical, in the effect of its provisions, with the act of April 7, 1874 (18 Stat., 27), which governs cases brought on appeal to this court from the supreme court of the Territories.

Indeed, the Territorial statute is less particular and binding in its character than the Admiralty statute.

We insist, therefore, that these decisions of this court, abundantly supported by the decisions of other courts, govern in this case; and that where it is shown that the findings are not supported by any evidence, or are against the uncontradicted evidence, or are a result of the perversion of the evidence, the court should consider these matters as matters of law.

In *Smith* v. *Glens Falls Insurance Co.* (62 N. Y., 85) it is held (p. 87):

> If a referee or judge refuses upon request to find a material fact, and an exception is taken, and such fact is conclusively proved, the exception will be available in this court.

This rule applies in respect to our request for a finding as to the effect of irrigation in Colorado upon the navigation of the Rio Grande (request No. 2, record, p. 110).

WITH RESPECT TO FINDING VII.

The supreme court of Missouri said, in *Waddell* v. *Williams* (50 Mo., 216, 219):

> Controverted facts, especially when the evidence is contradictory, will be considered * * * as correctly found in the trial court. But when documents or records are submitted in evidence their legal effect is matter of law.

And in *Willi* v. *Dryden* (52 Mo., 319) the same court said (p. 322):

> The court will not judge of the weight of testimony, but where the evidence consists of writ-

ten instruments we will look into them to see whether they were interpreted and construed according to their legal effect.

Finding VII, we may say, is based entirely upon the summary table of measurements offered in evidence on behalf of the Government for the purpose of showing the quantities of water passing down the river at certain points during certain years. (Appendix to record, p. 185.) It was not sufficient for the court simply to ascertain from this table the percentage of loss for any one year and assume that to be the average annual percentage of loss from year to year, but it was the duty of the court from all the measurements contained therein to determine this annual average percentage of loss. To find that fact was simply a matter of computation. This table of measurements being in evidence, and uncontradicted, must be accepted as a whole or rejected altogether. There is, therefore, involved here no question of the weight or the sufficiency of the evidence, but the question is as to the proper computation of, and the legal effect to be given to, this plain uncontroverted evidence.

In his conclusion (brief, p. 65 et seq.), counsel for defendants seeks to argue the relative merits of irrigation and navigation. We reply that we are not concerned with that. Congress alone has power to dispose of the waters of this river, if indeed they can be disposed of in any other manner than as provided by the doctrines of the common law.

And, again, counsel seeking to minimize the important question of how far recent irrigation has already impaired the navigability of this river, as tending to show what effect defendant's proposed dam would have, remarks that "there is precious little navigation down there to be preserved." The logic of his argument seems to be this: That Colorado and New Mexico having already diverted and appropriated a large proportion of these waters for irrigation, there is no harm in defendants taking the remainder.

We submit that there is error in the findings and rulings of the lower courts for which the judgments should be reversed; and that this court, even upon the findings, may reverse their judgments and render the judgment they should have rendered, in favor of the Government.

MARSDEN C. BURCH,
Of Counsel.

NOVEMBER 12, 1901.

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